

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
February 23, 2007¹ Session

**JIMMY ALAN MURPHY, ET AL.
v. LAKESIDE MEDICAL CENTER, INC.**

**Appeal from the Circuit Court for Hamilton County
No. 05 C 253 W. Neil Thomas, III, Judge**

No. E2006-01721-COA-R3-CV - FILED MARCH 26, 2007

The issue presented in this medical negligence case is whether the Plaintiffs' lawsuit was timely filed. At the request of Mr. Murphy's employer, physicians at Lakeside Medical Center (the "Medical Center") performed an annual physical examination, including a hearing test, on Mr. Murphy for over 20 years. Mr. Murphy was diagnosed with noise-induced hearing loss by an independent physician on January 21, 2004, and reported this information to his employer the next day. On February 13, 2004, Mr. Murphy obtained copies of the Medical Center's records indicating that Mr. Murphy had been experiencing hearing loss at a medically unacceptable rate for the past eight years. The Plaintiffs, Mr. Murphy and his wife, Glenda Murphy, filed their lawsuit on February 2, 2005, alleging that the Medical Center negligently failed to diagnose and treat Mr. Murphy's hearing loss over a period of several years, and that the Medical Center fraudulently concealed Mr. Murphy's hearing loss. The trial court granted the Medical Center's motion for summary judgment, finding that the Plaintiffs filed their complaint after the one-year statute of limitations had expired. After careful review, we hold that the Plaintiffs had notice of their claim no later than January 21, 2004, and their lawsuit was not timely filed. We also hold that the Plaintiff's allegation of fraudulent concealment is without merit. The decision of the trial court is affirmed.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed;
Case Remanded**

SHARON G. LEE, J., delivered the opinion of the court, in which HERSCHEL PICKENS FRANKS, P.J., and D. MICHAEL SWINEY, JJ., joined.

Mark E. Whittenburg, Chattanooga, Tennessee, for the Appellants, Jimmy Alan Murphy and wife, Glenda Murphy.

¹Oral arguments in this matter were heard as part of the Court's CASE Project (Court of Appeals Affecting Student Education), on February 23, 2007, at Sequoyah High School in Monroe County, Tennessee.

Arthur P. Brock and Timothy J. Millirons, Chattanooga, Tennessee, for the Appellee, Lakeside Medical Center, Inc.

OPINION

I. Background

In 1972, Mr. Murphy was hired by W.R. Grace & Co., a Chattanooga chemical manufacturer. The work environment is noisy, and in the mid-1970s or early 1980s, W.R. Grace contracted with Lakeside Medical Center to perform annual physical examinations, including hearing tests, for its employees. Mr. Murphy had his hearing checked at the Medical Center almost every year. In the mid-1990s, Mr. Murphy and his wife began noticing that Mr. Murphy was not hearing as well as he previously had. Although Mr. Murphy did not discuss this gradual hearing loss with his primary care physician, Dr. Glenn Beasley, he testified that he discussed it with the Medical Center doctors several times. None of the Medical Center's doctors ever told Mr. Murphy that he was experiencing work-related hearing loss. Dr. Jim Davis, a physician at the Medical Center who examined Mr. Murphy, told Mr. Murphy that his hearing was fine. Dr. Bruce Johnson, another physician at the Medical Center, told Mr. Murphy several times, "You're going to lose a little hearing with age. It looks normal to me," "I don't see anything to be worried about at all," and similar comments.

Mr. Murphy's hearing continued to deteriorate over the next decade. On January 13, 2004, Mr. Murphy complained to Dr. Beasley of decreased hearing in both ears that had grown worse over the past six months. Dr. Beasley referred Mr. Murphy to Dr. Christopher St. Charles, an otolaryngologist.² On January 21, 2004, Dr. St. Charles diagnosed Mr. Murphy with "significant likely noise induced sensorineural hearing loss." Dr. St. Charles also indicated that Mr. Murphy was a hearing aid candidate and advised him to take additional precautions around loud noises in the future. The following afternoon, Mr. Murphy reported his hearing loss to Dusty Rominger, the safety supervisor at W.R. Grace, and filled out an "Employee First Report of Accident" form. On the form, Mr. Murphy listed January 21 as the date of the accident. He described the accident as "Exposer [sic] to loud noises over 32 year career caused permanent damage to my hearing," and stated that the resulting injury was "severe hearing loss in both ears."

On January 26, 2004, Mr. Rominger asked Mr. Murphy to return to the Medical Center to have his hearing evaluated by Dr. Johnson. Dr. Johnson disagreed with the diagnosis of Dr. St. Charles, so Mr. Rominger then asked Mr. Murphy to go to Dr. Jeffrey Adams for another hearing assessment. On February 9, 2004, Dr. Adams confirmed Dr. St. Charles' diagnosis. At that time, Mr. Murphy also received a copy of a graph that showed the results of Dr. Adams' testing and the extent of Mr. Murphy's hearing loss. After returning to work, Mr. Murphy submitted a written request to obtain copies of the Medical Center's graphs from his annual hearing tests. Those records were provided to him on February 13, 2004, by Mr. Rominger, who allegedly told Mr. Murphy that the Medical Center's records indicated that Mr. Murphy's hearing had been deteriorating at a

² An otolaryngologist is a physician who specializes in treatment of the ear, nose, and throat.

medically unacceptable rate for the past eight years. Mr. Murphy stated that it was then that he realized that the Medical Center “had the numbers in front of them from year to year but that they fraudulently withheld, did not know how to interpret or negligently failed to interpret” the hearing exam results, resulting in further damage to Mr. Murphy’s hearing.

On February 2, 2005, the Plaintiffs filed their lawsuit against the Medical Center, alleging negligence and fraudulent concealment. Upon motion of the Medical Center, the trial court entered summary judgment in favor of the Medical Center, finding that the Plaintiffs’ complaint was not timely filed, based on expiration of the statute of limitations found in Tenn. Code Ann. § 29-26-116. The Plaintiffs appeal.

II. Issues

The issues we address in this appeal are restated as follows:

1. Whether the trial court erred in granting summary judgment to the Medical Center based upon the expiration of the statute of limitations.
2. Whether the trial court erred in finding that the Medical Center did not fraudulently conceal knowledge of Mr. Murphy’s hearing loss, thus tolling the statute of limitations.

III. Analysis

A. Standard of Review

Summary judgment is appropriate only when the moving party demonstrates that “there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Tenn. R. Civ. P. 56.04. The burden of proof rests with the moving party, who must establish that its motion satisfies these requirements. *Staples v. CBL & Associates, Inc.*, 15 S.W.3d 83, 88 (Tenn. 2000). If the moving party makes a properly supported motion, the burden shifts to the nonmoving party to establish the existence of disputed material facts. *Id.* (citing *Byrd v. Hall*, 847 S.W.2d 208, 215 (Tenn. 1993)). The nonmoving party may not simply rely upon the pleadings, but must instead set forth specific facts, by affidavits or other discovery materials, demonstrating the existence of a genuine issue of material fact for trial. *Byrd*, 847 S.W.2d at 211. The Supreme Court has emphasized that “genuine issue” in this context “refers to genuine factual issues and does not include issues involving legal conclusions to be drawn from the facts.” *Id.* (citing *Price v. Mercury Supply Co.*, 682 S.W.2d 924, 929 (Tenn. Ct. App. 1984)).

The standards governing the assessment of evidence in the summary judgment context are well established. Courts must view the evidence in the light most favorable to the nonmoving party and must draw all reasonable inferences in the nonmoving party’s favor. See *Robinson v. Omer*, 952 S.W.2d 423, 426 (Tenn. 1997); *Byrd*, 847 S.W.2d at 210-211. Summary judgment is appropriate only when the facts and the inferences to be drawn from the facts permit a reasonable person to reach

only one conclusion. See *McCall v. Wilder*, 913 S.W.2d 150, 153 (Tenn. 1995); *Carvell v. Bottoms*, 900 S.W.2d 23, 26 (Tenn. 1995).

Because a trial court's decision to grant a motion for summary judgment is solely a matter of law, it is not entitled to a presumption of correctness. See *Staples*, 15 S.W.3d at 88 ; *Carvell*, 900 S.W.2d at 26. Consequently, our task is to review the record to determine if the requirements of Rule 56.04 of the Tennessee Rules of Civil Procedure have been met. *Staples*, 15 S.W.3d at 88.

B. Discovery of the Cause of Action

The Plaintiffs assert that the trial court erred in finding their claim barred by the statute of limitations. The statute of limitations for medical malpractice cases is one year, but “[i]n the event the alleged injury is not discovered within such one (1) year period, the period of limitation shall be (1) year from the date of discovery.” Tenn. Code Ann § 29-26-116(a).

The Plaintiffs invoke the “discovery rule” set forth above as a means of saving their claim from summary judgment. Plaintiffs state that they did not learn of a potential cause of action against the Medical Center until February 13, 2004, when Mr. Murphy received copies of his records from the Medical Center. Therefore, the Plaintiffs assert that their lawsuit was not barred by the statute of limitations, because they filed the claim within a year of discovering their cause of action against the Medical Center.

The Tennessee Supreme Court adopted the discovery rule more than 30 years ago in *Teeters v. Currey*, 518 S.W.2d 512, 517 (Tenn. 1974). In *Teeters*, the plaintiff discovered that she was pregnant two and a half years after undergoing a tubal ligation for the purpose of sterilization. *Id.* at 512. Eleven months after learning of her pregnancy, she sued the doctor who had performed the surgery. *Id.* at 513. The trial court granted the defendant's motion for summary judgment based on the statute of limitations. *Id.* at 514. The Supreme Court reversed, stating, “We find it difficult to embrace a rule of law requiring that a plaintiff file suit prior to knowledge of his injury or, phrasing it another way, requiring that he sue to vindicate a non-existent wrong, at a time when injury is unknown or unknowable.” *Id.* at 515. The following year, the General Assembly codified the discovery rule in the Medical Malpractice Review Board and Claims Act. *Puckett v. Life Care of America*, No. E2004-00803-COA-R3-CV, 2004 WL 2138337, at *4 (Tenn. Ct. App. E.S., filed Sept. 24, 2004); see Tenn. Code Ann. § 29-26-116(a)(2).

Under the discovery rule, the statute of limitations in a medical malpractice case begins to run “when the patient discovers, or reasonably should have discovered (1) the occasion, the manner, and the means by which the breach of duty that caused his or her injuries occurred, and (2) the identity of the person who caused the injury.” *Id.* However, the plaintiff is not entitled to wait until he or she knows all of the injurious consequences caused by the alleged negligence before filing suit. *Shadrick v. Coker*, 963 S.W.2d 726, 733 (Tenn. 1998).

According to Mr. Murphy, every doctor who has diagnosed him with severe hearing loss has said that the damage is irreparable. Dr. St. Charles also told Mr. Murphy that further damage could

have been prevented if Mr. Murphy's hearing loss had been diagnosed sooner. Mr. Murphy recounted part of his conversation with Dr. St. Charles as follows:

Dr. St. Charles, the day he diagnosed my severe hearing loss, . . . he showed me the chart and where I fit in at the time. He said: "I wish we could have stopped it in this area³ and put your hearing aids in, Jimmy, because every study indicates, if we get your hearing aids in, we can stop the progression of the loss."

Although Dr. St. Charles did not explicitly state that the Medical Center had failed to diagnose Mr. Murphy's hearing loss, Dr. St. Charles did tell Mr. Murphy that his hearing loss had developed over a number of years and that further damage to his hearing could have been avoided if the problem had been diagnosed earlier. Mr. Murphy stated that when Dr. Johnson disagreed with Dr. St. Charles' diagnosis, he was confused and did not know who to believe. Even after Dr. Adams confirmed Dr. St. Charles' findings regarding Mr. Murphy's severe hearing loss, Mr. Murphy said he still was unaware of potential negligence on the part of the Medical Center until February 13, 2004, when he received the Medical Center's records from his annual hearing tests. Mr. Murphy therefore asserts that the statute of limitations did not begin to run until that date. However, the Plaintiffs' subjective reactions are not controlling of whether the statute of limitations should be tolled under the discovery rule. *Draper*, 1991 WL 7809, at *3. Rather, "the issue is not when the plaintiff realized he had a cause of action but when, in the exercise of reasonable care and prudence, an ordinary person could and should have realized that a cause of action existed." *Draper*, 1991 WL 7809, at *3. Considering the fact that the Medical Center was responsible for conducting Mr. Murphy's annual hearing tests, we believe that Dr. St. Charles' diagnosis and statements to Mr. Murphy would have placed an ordinary person in Mr. Murphy's position on notice of possible negligence.

The Plaintiffs argue that the conflicting diagnoses provided by Dr. St. Charles, Dr. Johnson, and Dr. Adams confused them to such a degree that they could not have reasonably been expected to know that Mr. Murphy's hearing loss was potentially the result of a wrongful act by the Medical Center. We disagree. It has been well established that the statute of limitations is tolled "only during the period when the plaintiff has no knowledge at all that a wrong has occurred, and, as a reasonable person, is not put on inquiry." *Pugh v. State*, No. W2004-01609-COA-R3-CV, 2005 WL 280348, at *3 (Tenn. Ct. App. W.S., filed Feb. 3, 2005). On January 21, 2004, the date that Dr. St. Charles diagnosed Mr. Murphy with "significant likely noise induced sensorineural hearing loss," Mr. Murphy was put on notice that doctors at the Medical Center might have failed to diagnose his hearing loss during his previous hearing tests. The fact that Dr. Johnson once again denied that Mr. Murphy had severe hearing loss following Dr. St. Charles' diagnosis is irrelevant for the purpose of determining when the statute of limitations began running. By the time of Dr. Johnson's assessment, Mr. Murphy had already been placed on notice of possible negligence by the Medical Center. Likewise, Mr. Murphy's acquisition of several years' worth of his hearing test records from the

³Mr. Murphy explained that Dr. St. Charles was pointing at the shaded area of the chart which indicated the normal hearing range for adults.

Medical Center, which confirmed that he had been experiencing significant hearing loss for at least the past eight years, does not change the fact that Mr. Murphy had already been placed on notice of possible negligence by the Medical Center. The focus of our inquiry is when a reasonable person should have been placed on notice of potential wrongful conduct which resulted in an injury, not when a plaintiff knows beyond doubt that his or her injury has been caused by wrongful conduct or when a plaintiff finds additional evidence of malpractice:

[A] plaintiff is deemed to have discovered the right of action if he or she is aware or should be aware of facts sufficient to put a reasonable person on notice that an injury has been suffered as a result of wrongful conduct. The later discovery of additional acts of negligence would not toll the statute of limitations once the discovery rule has initially been satisfied.

Sommer v. Womick, No. M2004-01236-COA-R3-CV, 2005 WL 1669843, at *4 (Tenn. Ct. App. M.S., filed July 18, 2005) (internal citation omitted).

We have noted that “the statute of limitations is tolled only during that period of time when the plaintiff has neither actual nor constructive knowledge of (1) the injury, (2) the wrongful conduct causing that injury, and (3) the identity of the party or parties who engaged in that wrongful conduct.” *Fluri v. Fort Sanders Regional Medical Center*, No. E2005-00431-COA-R3-CV, 2005 WL 3038627, at *4 (Tenn. Ct. App. E.S., filed Nov. 14, 2005). We find that Mr. Murphy had knowledge of all three of these facts on January 21, 2004, the date of Mr. Murphy’s appointment with Dr. St. Charles. At that time, Mr. Murphy was aware that he had sustained an injury – partial loss of his hearing. Because of Dr. St. Charles’ statements, Mr. Murphy should also have been aware that his injury was due, at least in part, to wrongful conduct, because an earlier diagnosis would have avoided much of the hearing loss that he has suffered. Finally, Mr. Murphy was aware of the identity of the alleged tortfeasor, as the Medical Center conducted Mr. Murphy’s annual physicals and hearing tests.

Furthermore, statements by Mr. Murphy indicate he recognized that the Medical Center may have been negligent before he received the records from that facility. During his deposition, the following exchange took place between counsel for the Medical Center and Mr. Murphy:

Counsel: At what point did you place blame or find fault or become angry or disgusted, discouraged, whatever, with Lakeside and Dr. Johnson?

Mr. Murphy: I can’t place a time. It’s when I come to the realization that he had this information and that he had misdiagnosed me for as long as he had been there, and this was his fault.

Counsel: And what – what brought that about? Did you go talk to a physician? Has a physician told you that Dr. Johnson misdiagnosed you?

Mr. Murphy: No. From what the specialist told me, I realized him saying, “You lose some with age,” was a lie. That’s –

Counsel: Okay.

Mr. Murphy: At what day I come to that realization, I can’t tell you.

Counsel: And, by specialist, you mean by what Dr. St. Charles told you, you put together that, in your words, that Dr. Johnson had lied to you?

Mr. Murphy: Dr. St. Charles, and then the company . . . sent me to their specialist

Counsel: Okay.

Mr. Murphy: He give me the same diagnosis as Chris St. Charles.

Counsel: Okay.

The Plaintiffs assert they were unaware of a potential claim against the Medical Center until they received the facility’s records from Mr. Murphy’s previous hearing tests. However, we find that the Plaintiffs already had knowledge of possible negligence by the Medical Center before Mr. Murphy received the records on February 13, 2004. As we have stated before, “[t]he discovery rule was not meant to allow a party to delay filing his claim until after he has completed the process of discovering all the factors that affect its merits.” *Steele*, 1995 WL 623067, at *5.

After careful review, we find from the undisputed facts that the Plaintiffs had notice of their claim no later than January 21, 2004. Thus, the trial court did not err in finding that the Plaintiffs’ suit was not timely filed within the one-year statute of limitations set forth in Tenn. Code Ann. § 29-26-116.

C. Fraudulent Concealment

The Plaintiffs also assert that the statute of limitations was tolled because the Medical Center fraudulently concealed knowledge of Mr. Murphy’s hearing loss. The elements of a fraudulent concealment claim have been set forth by the Tennessee Supreme Court as follows:

[A] plaintiff . . . attempting to toll the statute of repose contained in T.C.A. 29-26-116(a)(3) by relying upon the fraudulent concealment

exception to the statute must establish that (1) the health care provider took affirmative action to conceal the wrongdoing or remained silent and failed to disclose material facts despite a duty to do so, (2) the plaintiff could not have discovered the wrong despite exercising reasonable care and diligence, (3) the health care provider knew of the facts giving rise to the cause of action and (4) a concealment, which may consist of the defendant withholding material information, making use of some device to mislead the plaintiff, or simply remaining silent and failing to disclose material facts when there was a duty to speak.

Shadrick, 963 S.W.2d at 736. In the case at bar, the Plaintiffs allege that doctors at the Medical Center repeatedly misdiagnosed Mr. Murphy's hearing loss as a normal consequence of aging, rather than a work-related injury. However, the failure to correctly diagnose an ailment cannot be the basis for a fraudulent concealment claim unless the defendant had knowledge of the correct diagnosis. We have stated previously that "if the defendants failed to diagnose the condition of the plaintiff and such failure to diagnose the true condition fell below the applicable standard of care, it could not also constitute fraudulent concealment. . . . [H]ow can one fraudulently conceal that which one does not know?" *Mayers v. Miller Medical Group*, No. 01-A-01-9802-CV00101, 1998 WL 848095 (Tenn. Ct. App. M.S., filed Dec. 8, 1998). Furthermore, we find that the plaintiff could have discovered the Medical Center's alleged misdiagnosis by exercising reasonable care and diligence; the Medical Center promptly complied with Mr. Murphy's request to receive a copy of his medical records after he submitted the request to his safety supervisor at W.R. Grace. Thus, we hold that the Plaintiffs' allegations of fraudulent concealment by the Medical Center are without merit, and the statute of limitations was not tolled for that purpose.

IV. Conclusion

After careful review, we hold that the trial court was correct in granting summary judgment to the defendant Medical Center based on the expiration of the statute of limitations. We affirm and remand this case to the trial court for further proceedings consistent with this opinion. Costs of appeal are taxed against the Appellants, Jimmy Murphy and Glenda Murphy.

SHARON G. LEE, JUDGE